

Juta's Quarterly Review of South African Law

Public Procurement

January 2018 – June 2020

Contents

January to March 2018 (1)	4
1. Legislation	4
2. Cases	4
2.1 Strict compliance with tender conditions	4
2.2 Time frame for challenging procurement decisions on review	5
2.3 Variation of contractual terms.....	6
2.4 Extension of tender validity period.....	6
2.5 Judicial review of tender awards: Remedies.....	7
April to June 2018 (2)	10
1. Legislation	10
2. Cases	10
2.1 Strict compliance with tender conditions	10
2.2 Joinder of parties	11
2.3 Time frame for challenging tender awards in terms of s 62 of the Municipal Systems Act 32 of 2000	12
2.4 Emergency procurement procedure requirements.....	12
3 Literature	13
July to September 2018 (3)	15
1. Legislation	15
2. Cases	15
2.1 Judicial review of tender awards: Remedies.....	15
2.2 Strict compliance with tender conditions	16
October to December 2018 (4)	20
1. Legislation	20
2. Cases	20

2.1 Correct approval for transversal contracts	20
2.2 Locus standi.....	21
3. Literature	21
January to March 2019 (1).....	23
1. Legislation.....	23
2. Cases.....	23
2.1 Exhausting internal remedies	23
2.2 Evaluation and adjudication of tenders	23
3. Literature	24
April to June 2019 (2)	25
1. Legislation.....	25
2. Cases.....	25
2.1 Strict compliance with tender conditions	25
2.2 Award of preference points	27
3. Literature	28
July to September 2019 (3).....	30
1. Legislation.....	30
2. Cases.....	30
2.1 Judicial review of tender awards: Remedies.....	30
2.2 Strict compliance with tender conditions	33
October to December 2019 (4)	37
1. Legislation.....	37
2. Cases.....	37
2.1 Non-compliance with statutory provisions.....	37
2.2 Remedies.....	38
3. Literature	38
January to March 2020 (1).....	41
1. Legislation.....	41
2. Cases.....	41
2.1 Application of s 217 of the Constitution	41
2.2 Joinder.....	43
2.3 Regulation 32 'piggy-back' procurement	44

3. Literature	45
April to June 2020 (2)	49
1. Legislation	49
2. Cases	49
2.1 Strict compliance with tender conditions	49
2.2 Fraudulent contracts	49
3. Literature	50

January to March 2018 (1)

JQR Public Procurement 2018 (1)

Allison Anthony

1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Strict compliance with tender conditions

The matter of *ABET Inspection Engineering (Pty) Ltd v The Petroleum Oil and Gas Corporation of South Africa* came on appeal from the judgment of Holderness AJ³ in which the application for the review and setting aside of the decision of the organ of state PetroSA to accept the tender of Vumela for the provision of quality control and approved inspection authority services at certain of PetroSA's installations with effect from the end of August 2016 was denied.

The appellant, Vumela, submitted that the respondent organ of state had incorrectly awarded a bid to the winning bidder, ABET Inspection Engineering (Pty) Ltd, when the bidder did not, as required by the tender conditions, submit an accreditation certificate in respect of its accreditation by the South African National Accreditation System (SANAS) and the Department of Labour (DoL) in terms of the Occupational Health and Safety Act 85 of 1993. The winning bidder explained that it had recently taken over a division of another entity as a going concern and which division would render the requested services. While the winning bidder had applied for accreditation certificates to be issued in its own name, it had not received those at the time of the close of bids, thus relying on the certificates previously issued to the division under the name of the previous owner. The appeal court reiterated the purposive approach used in its previous judgment in that substance should prevail over form when deciding whether the submission of the certificates in the name of the previous owner constituted a material error which would render the award of the tender to the winning bidder unlawful.⁴

The court held that in the circumstances, the evaluation committee was entitled to accept that the accredited body now belonging to Vumela was an accredited body within the meaning of the Act. If the committee were to reject the tender, it would have acted wrongly.⁵ This is so as the subject of accreditation was the organisation or facility that would perform the inspections and not the people or entities who owned it. Moreover, a rejection would have frustrated the objects of s 217 of the Constitution when it was only a matter of name changing on the certificates which had to occur. This would have resulted in non-compliance with competitiveness and cost-effectiveness.⁶ As such, no irregularity or deviation from legal requirements was proven.

In *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* the appellant municipality invited bids for the operation and maintenance of its bulk water and sewerage infrastructure. This judgment results from an appeal from the decision of the Western Cape High Court

in which the court set aside the tender award to the winning bidder, save that the setting aside of the contract is suspended until the tender is re-awarded or on the lapse of a period of two months, whichever is earlier.

The question to be answered by this court was whether the winning bidder in all respects complied with the conditions of tender in the request for proposals. The respondent bidder relied on s 6(2)(b) of PAJA which allows for judicial review of an administrative decision where a mandatory or material procedure or condition prescribed by an empowering provision was not complied with. In addition, it relied on the meaning of an 'acceptable tender' as defined in the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) which means any tender which in all respects complies with the specifications and conditions of tender set out in the tender document. To this end, the respondent bidder alleged that the winning bidder failed to comply with the staffing requirements in the tender conditions as prescribed by the Water Services Act 108 of 1997. The conditions in turn require compliance with this legislation in that a minimum number of staff must be employed by the bidder in order to operate and maintain water infrastructure. The court held that this condition was written in peremptory terms and nothing in the tender conditions, legislation or regulations affords the municipality the power to condone non-compliance with mandatory and material requirements set out in the tender conditions.⁸ The court further recognised the possible sufficiency of substantial compliance with material requirements and acknowledged that it should guard against invalidating a tender that contains minor deviations that do not materially differ from or alter the tender conditions.⁹

The court found that the non-compliance in this case was in fact not trivial or minor. It found that the winning bid was in fact not 'acceptable' as required by the PPPFA, nor did it comply in all respects with the tender conditions. Therefore, the challenge brought in terms of s 6(2)(b) of PAJA is upheld. As such, the court held it to be in the interest of the public and all current and prospective bidders that the tender process be started anew in line with the PPPFA and the principles of fairness, equity, transparency, competition and cost-effectiveness in s 217 of the Constitution.¹⁰

2.2 Time frame for challenging procurement decisions on review

The court in *Airports Company South Africa SOC Ltd v Rapivest 12 (Pty) Ltd* was once again faced with an application for condonation of a late application due to a delay. The court held that the expeditious and diligent compliance with constitutional obligations is based on sound judicial policy that takes cognisance of the public interest in both legal certainty and finality.¹² It has also been recognised by the Supreme Court of Appeal (SCA)¹³ that a court should be slow to allow procedural obstacles to hinder it from considering a challenge to the lawfulness of an exercise of public power.¹⁴ The court found that in deciding whether it was in the interest of justice to grant the application for an extension of the 180-day period as required by s 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), it would need to consider, amongst other factors, whether a full and adequate explanation for the delay was provided, to what extent, if any, the impugned decision has been given effect to, whether and to what extent the delay has caused prejudice to those affected by the decision, the impact of the delay on the public interest considerations of certainty and finality and a consideration of the merits of the review application at hand.¹⁵

The court subsequently held that an extension of the 180-day period was permissible in light of the fact that the organ of state had in fact conceded to the allegation of invalidity of the tender it awarded to the second respondent bidder. Moreover, the organ of state's undertaking to furnish the unsuccessful applicant bidder with reasons as to why its bid was unsuccessful before concluding or implementing an agreement with the winning bidder was not fulfilled. Despite this undertaking, the organ of state concluded an agreement with the winning bidder notwithstanding its concession and indication that it would set the decision to award the tender to the winning bidder aside and remit it for re-consideration. On these grounds, an extension of the 180-day period was condoned.

2.3 Variation of contractual terms

In *Corruption Watch (NPC) (RF) v Chief Executive Officer of the South African Social Services* the applicant alleged corruption on the part of the respondent organ of state in its agreement with Cash Paymaster Services (Pty) Ltd. The applicant challenged two decisions – that of a payment made from SASSA to Cash Paymaster Services (Pty) Ltd which payment was the result of the second decision challenged, which is an alleged variation to the service level agreement between the parties. The applicant alleged that s 6(2)(a)(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was contravened in that the provisions of the then existing Supply Chain Management Policy were not complied with, rendering the decisions unlawful. Upon interpretation of the alleged variation agreement based on the court's approach in the *Endumeni* judgment,¹⁷ the court found that the alleged agreement in fact constituted the minutes of a meeting held between the contracting parties and that no variation of the service level agreement was intended.¹⁸ Therefore, the payment made allegedly in terms of the agreement was not justified. Any decision to vary the agreement was made unilaterally and cannot form the basis of a variation agreed upon by all parties.¹⁹ Since there was no variation of the terms which justified the payment made, it was thus without any basis and therefore unlawful.²⁰ Furthermore, the alleged variation was void for vagueness, which is a ground on which procurement and other administrative decisions can be reviewed. To this end, the court relied on the Constitutional Court judgment in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* in which it was held that 'vagueness can render a procurement process, or administrative action, procedurally unfair under section 6(2)(c) of PAJA'.²² The variation in this matter was not envisaged by the request for proposal, therefore, the exclusion of other bidders in favour of Cash Paymaster Services (Pty) Ltd is unfair and contrary to the rule of law. The decision should thus be reviewed and set aside. Moreover, the Public Finance Management Act 1 of 1999 requires that organs of state such as SASSA must determine their Supply Chain Management Policy, which policy provides that the Bid Committee's approval based on valid reasons be sought in the event of a variation of the agreement. The alleged variation in this matter was concluded without such approval, rendering it unlawful in that it falls foul of s 6(2)(c) of PAJA due to lack of authorisation. As a result, the payment flowing from an unlawful agreement was unlawful as well.

2.4 Extension of tender validity period

In the matter of *Raubex Construction (Pty) Ltd v Road Agency Limpopo SOC*, the respondent organ of state advertised an invitation for tenders for the upgrade of a road in Limpopo Province. The invitation

stated a closing date by which all tenders must be submitted and that all tenders received would remain valid for a period of 90 days. A day after the expiry date, the organ of state addressed letters to all bidders in which an extension of the validity period was indicated. In the notice, bidders were requested to agree to the extension and in failing to do so, their bids would become invalid. Such bidders would automatically be excluded from the tender process based on the invalidity of their bids.

The court held that tenders submitted within the tender validity period of 90 days as indicated in the tender documents remain open for acceptance within this period. If the expiry date is reached without a tender offer being received, the invitation to receive offers would lapse and come to an end.²⁴ Offers made in time, would remain valid until expiry of the 90-day period. If no offer is accepted in this period, all offers are rendered invalid and the tender process simply lapses. When the tender process has come to an end, invalid offers can no longer be accepted. Offers that have been rendered invalid cannot be validated simply by extending the validity period *ex post facto* the lapsed tender process. Furthermore, an arrangement that only those bidders who consented to an extended validity period will be eligible for consideration cannot be sustained. This is because no provision was made in the tender documents that when the tender process comes to an end, invalid offers due to expiry of the validity period can be revived by agreement.²⁵

The court reiterated that a tender process is subject to s 217 of the Constitution which requires the process to be fair, equitable, transparent, competitive and cost-effective. Such a process cannot result from an arrangement in which a few bidders consent to an invitation to revive a lapsed tender process, thereby validating their invalid offers retrospectively.²⁶ Therefore, this tender process did not comply with the prescripts of the Constitution. The tender awarded to the second respondent was thus set aside.

2.5 Judicial review of tender awards: Remedies

In the never-ending saga of *South African Social Security Agency v Minister of Social Development*, the Constitutional Court was once again called upon to extend the period of invalidity of the contract between SASSA and Cash Paymaster Services (CPS). The declaration of invalidity was further suspended for a six-month period from 1 April 2018 in order to ensure that payment of social grants is made to beneficiaries. Although this judgment was not strictly a procurement matter, it is noteworthy from a procurement-law perspective for the continued extension of the period of invalidity of the procurement contract. This is based on the court's previous judgment²⁸ in which it remarked that both SASSA and CPS as the private service provider were under a constitutional obligation to ensure that grants continued to be paid to beneficiaries and that it was within the courts' remedial powers to grant a just and equitable order to extend the contractual relationship between the parties.

1 BA LLB LLM LLD (Stellenbosch), Lecturer, Department of Public Law & Jurisprudence, University of the Western Cape.

2 Unreported, referred to as [2018] ZAWCHC 7, 1 February 2018; available online at <http://www.saflii.org/za/cases/ZAWCHC/2018/7.html>.

3 *Abet Inspection Engineering (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd* (unreported, referred to as [2017] ZAWCHC 39, 8 March 2017; available online at <http://www.saflii.org/za/cases/ZAWCHC/2017/39.html>).

4 Para 7.

5 Para 22.

6 Para 23.

7 Unreported, referred to as [2018] ZASCA 50, 29 March 2018; available online at <http://www.saflii.org/za/cases/ZASCA/2018/50.html>.

8 Para 49.

9 Para 50.

10 Para 51.

11 *Rapivest 12 (Pty) Ltd v Airports Company South Africa SOC Ltd; Airports Company South Africa SOC Ltd v Rapivest 12 (Pty) Ltd* (unreported, referred to as [2018] ZAWCHC 16, 1 February 2018; available online at <http://www.saflii.org/za/cases/ZAWCHC/2018/16.html>).

12 Para 54.

13 *In State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA).

14 Para 55.

15 Para 57.

16 Unreported, referred to as [2018] ZAGPPHC 7, 23 March 2018; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2018/11.html>.

17 See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

18 Para 15.

19 Para 16.

20 Para 17.

21 2014 (1) SA 604 (CC).

22 See paras 87–88.

23 Unreported, referred to as [2018] ZALMPPHC 1, 18 January 2018; available online at <http://www.saflii.org/za/cases/ZALMPPHC/2018/1.html>.

24 Para 11.

25 Para 12.

26 Para 16.

27 Unreported, case no CCT48/17 (CC), 23 March 2018.

28 See *Black Sash Trust v Ministers of Social Development (Freedom Under Law Intervening)* 2017 (3) SA 335 (CC) and *JQR Public Procurement* 2017 (1) 2.5.

April to June 2018 (2)

JQR Public Procurement 2018 (2)

Allison Anthony ¹

1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Strict compliance with tender conditions

In *WDR Earthmoving Enterprises v Joe Gqabi District Municipality* the Supreme Court of Appeal was again faced with the issue of compliance with strict tender conditions. This matter was one of construction procurement in which bidders were required to submit audited financial statements. The bid awarded to the fourth respondent was objected to by the first and second appellant, whose joint venture bid was upon investigation declared non-responsive for lack of compliance with required documents, specifically annual financial statements.

The court had three questions to answer: firstly, whether the appellants had standing to seek review and setting aside of the fourth respondent's tender offer as responsive and also the award of the tender to the fourth respondent. Secondly, whether the declaration of the appellants' tender offer as non-responsive was reviewable and, thirdly, whether the declaration of the fourth respondent's tender as responsive was reviewable. ³

On the first issue, the court held, without expressly deciding, that the matter before it was one of administrative law and that the impugned action adversely affected the rights of the appellants in that the award of the tender to the fourth respondent had a direct effect upon their interests or potential interests in the matter. ⁴ In the event of a decision against the fourth respondent, the tender process would have to be started afresh as the only responsive tender offers were initially those of the appellants and the fourth respondent. The parties would thus, together with any other interested parties, be entitled to compete for the fresh tender. Therefore, the appellants had standing to seek the review and setting aside of the declaration of the fourth respondent's tender offer as responsive as well as the award of the tender to the fourth respondent.

On the second issue, the court considered the tender documents. The court held that the obligation to furnish audited annual financial statements is found in the Municipal Supply Chain Management Regulations ⁵ in terms of s 168 of the Local Government: Municipal Finance Management Act 56 of 2003. ⁶ The Regulations provide that a supply chain management policy must provide the criteria with which tender documentation must comply. The municipality's policy does in fact include this provision and in interpreting the Tender Data and Standard Conditions of Tender, in the event of ambiguity or inconsistency, the Tender Data shall prevail. Upon an interpretation the court established that the Tender Data provides that specifically audited annual financial statements should be provided by

tenderers. The court, in referring to previous judgments,⁷ held that a failure to comply with prescribed conditions results in a tender offer being declared non-responsive unless the conditions were immaterial, unreasonable or unconstitutional.⁸ Furthermore, an administrative authority has no inherent power to condone failure to comply with a peremptory requirement and only has such power if such discretion has been given. Therefore, without a specific provision in the tender invitation stating that a municipal officer or committee has been afforded discretion to condone a failure to comply with any prescribed condition of tender, the failure to comply cannot be condoned. The court held that the obligation to provide audited annual financial statements is found in legislation; therefore, a failure to provide those statements cannot be regarded as trivial, minor, immaterial, unreasonable or unconstitutional. In relying on the Tender Data as the document which takes precedence in the event of ambiguity or inconsistency, the court held that the Tender Data requires submission of audited annual financial statements as a peremptory provision and is inconsistent with the discretion afforded in the Standard Conditions of Tender. The peremptory provision thus takes precedence.

On the third issue, the court accepted the argument made by the appellants that the fourth respondent's tender offer should have been declared non-responsive due to its submission of unaudited financial statements. Although, unlike the appellants, the fourth respondent's financial statements were complete, they were unaudited and as such did not comply with the tender documents. The municipality thus erred in concluding that the offer made by the fourth respondent was responsive.

2.2 Joinder of parties

In the matter *Sam NO v The National Minister of Finance, National Treasury Department*,⁹ the SA Red Cross Air Mercy Service Trust (hereafter SA Red Cross) was the successful tenderer in a bid to provide national aero-medical services to the state for a period of three years. The services were rendered particularly in the Mpumalanga and Limpopo provinces. A few months into the contract, National Treasury summarily cancelled the contract with 30 days' notice, citing deficiencies in the bid adjudication process as reasons for the cancellation. SA Red Cross then obtained a court order interdicting the respondents from implementing the cancellation of the contract. Limpopo Head of Department for Health instructed SA Red Cross to make its services available and later cancelled the request after SA Red Cross had prepared for rendering its services. SA Red Cross subsequently sought a court order interdicting the respondents from cancelling the instruction by the Limpopo Department of Health.

National Treasury denied being involved in the Limpopo Province's decision to rescind its letter requesting performance from SA Red Cross. It argued that the provision of aero-medical services falls under s 25 of the National Health Act 61 of 2003 which places the provision of such health services within the domain of the provinces.¹⁰ National Treasury therefore had no role to play in the matter and should thus not have been cited in the proceedings. The question faced by the court was thus whether any relief could be claimed against the National Treasury.¹¹

The court held that there was no indication that National Treasury had been involved in the above decision. In fact, their advice was to the contrary, which was to implement the original contract with SA

Red Cross by using its services.¹² The court further upheld National Treasury's reference to the responsibilities of the different spheres of government and their areas of functionality.¹³ However, despite this, National Treasury is a contracting party to the agreement with SA Red Cross and accepted its bid to render the above services to the state. A private service provider such as SA Red Cross should thus be entitled to expect the state to take all reasonable steps to implement the contract.¹⁴ The court held that although it is not clear to what extent the National Treasury's enabling legislation empowers it as a contracting party to ensure compliance with the contract by the provinces, it is clear that some coercive steps can and should be taken.¹⁵

Despite this, the court held that because it has a duty to ensure that its order has practical efficacy, it is not effective to join the National Treasury in the relief claim by SA Red Cross since it had no part in Limpopo Province's impugned decision. It would thus be inappropriate to make them a party to a review of the decision.

2.3 Time frame for challenging tender awards in terms of s 62 of the Municipal Systems Act 32 of 2000

In *Amandla GCF Construction CC v Municipality Manager of Saldanha Bay Municipality* the court was faced with the question as to whether a municipal manager has the authority to extend the period in which an appeal in terms of s 62 of the Local Government: Municipal Systems Act 32 of 2000 must be lodged. The municipality argued that the extension was made in accordance with the desire for a fair process to afford all affected tenderers who may wish to lodge an appeal the opportunity to do so, given that some tenderers received the notice shortly before expiry of the 21 days. The court held that there is no general power given to a municipality to extend a statutory time period except where such power is conferred on it as permitted by that particular section of the statute.¹⁷ In the end, it depends upon the interpretation of the specific statute. As such, a general power to ensure a fair process does not trump the legislature's intention for the provision to operate as an absolute bar. Furthermore, the language used in s 62 indicates the intention to have appeals settled promptly. Specific time periods are used in order to ensure this.¹⁸ Moreover, fairness cannot be viewed only from the position of the unsuccessful tenderer. The perspective of all tenderers, including the winning tenderer, whose award is suspended until the expiry of the 21 days or the outcome of the appeal, must be considered.¹⁹ Such an approach promotes the spirit of the rights enshrined in s 33 of the Constitution. In addition to this, s 62 applies generally to decisions made by officials and not only in the tender context. The section therefore cannot be read to empower an official to condone late filing, or to extend the time period.²⁰ Although the working of s 62 is neutral and does not expressly exclude or include powers to extend the time period, interpreting the section to give the municipality implicit powers to extend the 21 days would give the municipality wide power to extend the deadline by whichever period it deems fit, which may be of a long or indefinite duration. Such an interpretation would go against what the legislation seeks to achieve.²¹

2.4 Emergency procurement procedure requirements

The court in *Ngaka Modiri Molema District Municipality v Naphtronics (Pty) Ltd* once again reiterated the importance of following correct procurement procedures and regulations in the case of emergency procurement. In this matter the Ngaka Municipality concluded an agreement with Naphtronics (Pty) Ltd for the provision of emergency security services. An agreement of three years was subsequently concluded. The court held that the procurement in question was regulated by s 217 of the Constitution, the Local Government: Municipal Finance Management Act 56 of 2003 and the Municipal Supply Chain Management Regulations issued in terms of the Act. As such the municipality must demonstrate why it was impractical to invite competitive bids. Where a deviation from these rules which is permitted by law is necessary, the reasons for such deviation must be recorded and approved by the Accounting Officer or Authority of the municipality.²³ The court held that although an emergency prevailed at the time the contract was concluded, such conclusion offends against the principles of legality and was not rational, thus it cannot be legally sustained. The municipality had circumvented the entire procurement process without any sound or valid reasons or justifications. Furthermore, a contract entered into for an emergency situation must address the emergency at the time and not in the distant future as this contract did.²⁴

3 Literature

Arrowsmith, S *The Law of Public and Utilities Procurement* (Vol 1) 3 ed (Sweet & Maxwell 2018)

1 BA LLB LLM LLD (Stellenbosch), Lecturer, Department of Public Law & Jurisprudence, University of the Western Cape.

2 Unreported, referred to as [2018] ZASCA 72, 30 May 2018; available online at <http://www.saflii.org/za/cases/ZASCA/2018/72.html>.

3 Para 11.

4 Para 14.

5 GN 868 in GG 27636 of 30 May 2005.

6 Para 21.

7 *Dr JS Moroka Municipality v Betram (Pty) Ltd* [2014] 1 All SA 545 (SCA); *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd*; *Minister of Environmental Affairs and Tourism v Smith* 2004 (1) SA 308 (SCA) para 31.

8 Para 30.

9 Unreported, referred to as [2018] ZAGPPHC 436, 16 May 2018; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2018/436.html>.

10 Para 5.4.

11 Para 6.3.

12 Para 6.4.

13 Para 6.5.

14 Para 6.7.

15 Para 6.8.

16 Unreported, referred to as [2018] ZAWCHC 77, 22 June 2018; available online at <http://www.saflii.org/za/cases/ZAWCHC/2018/77.html>.

17 Para 32.

18 Para 33.

19 Para 35.

20 Para 36.

21 Para 39.

22 Unreported, referred to as [2018] ZANWHC 8, 25 May 2018; available online at <http://www.saflii.org/za/cases/ZANWHC/2018/8.html>.

23 Para 37.

24 To this end the court agreed with the applicant's reliance on para 23 of the unreported judgment in *Ngaka Modiri Molema District Municipality v Azranite Investment (Pty) Ltd and RG Nair* (unreported, NC case number 409/15) in which the court held that 'a contract entered into for emergency situations must address the emergency situation now and in the not distant future... The administrator should not be allowed to bind the municipality in a long term contract whilst masquerading under the cover of an "emergency situation". If he/she does enter into such a long term contract, there must be reasons why he/she cast his/her net so far in the future.'

July to September 2018 (3)

JQR Public Procurement 2018 (3)

Allison Anthony¹

1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Judicial review of tender awards: Remedies

In the never-ending saga of *South African Social Security Agency v Minister of Social Development* the court was yet again approached for an extension of the unlawful contract declared invalid by the court initially in 2014. After a year extension was granted from 1 April 2017 to 31 March 2018, a further six months' extension was sought from 1 April 2018. Of significance is that the court, in its last judgment in this matter, requested the Minister of Social Development and the Chief Executive Officer of SASSA to show cause as to why they should not be held personally liable for the costs of the proceedings based on the court's finding that they had failed to comply with previous court orders.

The court held that an extension of a declaration of invalidity is not automatically permissible. A proper case justifying the extension must be made out since the effect of suspending the operation of a declaration of invalidity is to keep alive the conduct declared unlawful. The reasons for the initial suspension of the declaration of invalidity were to avoid disruption of social grants and to afford SASSA an opportunity to advertise a fresh tender. The court held that the explanation as to why the latter did not occur was gravely insufficient. Furthermore, the principle of finality which in turn promotes legal certainty, forms part of the rule of law which is a founding value of the Constitution. The need to finalise this matter is even more acute since numerous cases on the matter have come before the Constitutional Court alone. The uncertainty around social grants must thus end, considering the practical consequences and the potential prejudice which may ensue. Despite adequate reasons which warrant a refusal to extend the suspension, the adverse effect on the large number of poor people if the contract is not extended cannot be ignored. A balance of interests thus needs to occur. In the end, a just and equitable remedy would be to grant a further extension of the suspension of the invalidity order to avoid serious prejudice.

As to the issue of costs, the court confirmed that it is not settled that public officials who are guilty of bad faith or gross negligence in litigation may be held personally liable for costs. Although the Minister argued that to do so would encroach upon the separation of powers principle, the source of the court's power to make such an order comes from the Constitution itself, which mandates that courts uphold and enforce the Constitution. The object of such an order is thus to vindicate the Constitution. The Minister further argued that the court is not competent to make such an order in the absence of such a request from one of the parties. The court found this argument to be ill-conceived and held that fairness demands that such a party be warned that the court contemplates a personal costs order and the party

must be afforded an opportunity to address the court on the issue. This requirement was in fact dispensed with. If the refusal of a further extension did not have as a consequence the severe prejudice of innocent grant recipients, it would have been refused. Therefore, the Minister of Social Development and the CEO of SASSA must bear the costs of the application jointly and severally.

2.2 Strict compliance with tender conditions

In the matter *Mobile Telephone Networks (Pty) Ltd Transnet SOC Ltd* the mobile networks MTN and Vodacom submitted tenders to Transnet SOC. The aggrieved tenderer, MTN, challenged its disqualification from the tender process based on non-compliance with tender conditions as well as the acceptance of Vodacom's tender as responsive. With regard to MTN's disqualification, the tender conditions required that the details of the pricing schedule should be listed in South African rands. Instead, MTN recorded 'N/A' in its tender documents. The court referred to the tender conditions which stated that no indication of prices other than rands will be accepted and failure to comply with this condition will lead to disqualification from the tender process. The court held that although it is clear that MTN failed to comply with this condition, the question to ask was whether this non-compliance was material. To this end, the court referred to the *Allpay* judgment⁴ in which it held that the proper approach is to establish whether an irregularity has occurred and whether such irregularity amounts to a ground of review under the Promotion of Administrative Justice Act 3 of 2000. This evaluation must consider the materiality of a deviance from legal requirements by linking the compliance and the purpose of the provision.⁵ The court confirmed that there is no implied or tacit discretion to condone non-compliance with a tender condition.⁶ Although MTN contended that the meaning of 'N/A' was explained in its bid documents and that there was no material difference between 'N/A' and 'R' which represented a value in rands, the court held that a person scrutinising the documents would not know where to look for such explanation and why such person would think that an explanation of 'N/A' is 'tucked away'⁷ and should be consulted. Moreover, MTN had repeatedly been informed how to complete the pricing schedule and ignored the instruction. This non-compliance was material since the purpose of strict compliance was to facilitate a like-with-like comparison between tenders. The court further inferred that the digital tender information must have been requested for capture into a matrix. Failure to do so would have inhibited a clean process of comparison. The meaning of 'N/A' is not obvious and the actual meaning intended by MTN was the least likely to be guessed. Therefore, Transnet's demand for compliance was rationally connected to the purpose of the requirement and thus reasonable.

With regard to MTN's grievance that Vodacom should have been disqualified, it contended that the tender conditions stated that a tenderer had to exceed a 70% evaluation threshold for technical capacity and that Transnet reserves the right to lower this to 60% if no tenderers pass the minimum threshold. Vodacom was the only bidder to be considered, since MTN's tender was found to be non-responsive. The court held that because only one tenderer was being evaluated, the *de facto* threshold was 60%.⁸ Vodacom had an initial score of 51.1% and Transnet obtained clarification from Vodacom regarding the technical aspects of its tender. The result of this was a re-scoring to 63.5% which meant that Vodacom's tender could be evaluated further. MTN argued that if clarification could be obtained from Vodacom, the same should be applicable to MTN in clarifying the meaning of 'N/A'. The court held

that the opportunity to clarify is not available or appropriate at the earlier stages of the tender process which deal with formalities and responses to standardised questions to enable comparisons.⁹ What must occur is a mere clarification and not an augmentation. Clarification cannot add any new substantive representation but it is permissible to ask for verification and explication of that which has already been presented. The purpose of this must be to 'explain, eliminate obscurity of meaning... Permitting a clarification opportunity recognises that the use of language to express complexities is riven with potential confusions, and no less, describing technology, is, similarly, inherently susceptible to innocent misunderstandings. Not to seek clarification would be inherently imprudent.'¹⁰ This is what Vodacom provided and as such MTN's contention was meritless.

The tender conditions further required an indication that the tenderer was able to achieve the service level targets set out in the tender documents. MTN argued that Vodacom provided an explanation and not a mere 'yes' or 'no' as required. However, the tender conditions provided that where a tenderer indicates 'no', it must indicate its proposed minimum service level target. Therefore, further explanation after indicating 'no', as Vodacom did, was permitted. The rigidity of the earlier stages of the tender process could thus not be compared with the evaluation in later stages. MTN's application was thus dismissed.

In the judgment *Imperial Group Limited v Airports Company South Africa SOC Limited* the court held that a purposive interpretation of s 217 of the Constitution does not restrict the means of acquiring goods and services to any particular kind of contract. It allows for goods and services to be acquired by any lawful and contractual means including by purchase, renting, leasing, letting or hiring. The acquisition need not be direct and can be done through the agency of another. This may include outsourcing, sub-contracting and acquisition on behalf of the state. Furthermore, the acquisition need not be for an organ of state's own benefit but may be, in the exercise of the organ of state's legislative mandate, for the benefit of others including other state bodies and the public or a section thereof.¹²

With regard to Airports Company South Africa (ACSA), it does not let space to car rental companies merely for the sake of letting such space and collecting rental but it does so to acquire, for the benefit of the public who use its airports, the services provided by those rental companies which it cannot itself provide.¹³ It does so in accordance with its legislative mandate in terms of the Airports Company Act 44 of 1993. Therefore s 217 is applicable to such a contract between ACSA and a car rental company.

Since s 217 is applicable, ACSA must comply with all legislation contemplated in s 217 including the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and failure to do so in providing for an evaluation system which provided for price to be evaluated out of 50 points and preference out of 50 points is unlawful. This failure renders the decision to publish the request for bids (RFB) and the RFB itself unconstitutional and unlawful and thus reviewable under the principle of legality, alternatively the Promotion of Administrative Justice Act 3 of 2000 (PAJA).¹⁴

In addition, the RFB provided for pre-qualification criteria based on ownership, enterprise, supplier development and management control. Imperial argued that ACSA has no power, whether implied or express, to impose the pre-qualification criteria in the RFB. The court held that what is required is an

express power because implied powers are usually ancillary or incidental to such express powers.¹⁵ As an organ of state, ACSA is bound by the Broad-Based Black Economic Empowerment Act 53 of 2003 which gives an express power to the Minister to include qualification criteria for preferential purposes in codes of good practice which must be applied by organs of state. Therefore, by including and imposing the pre-qualification criteria in the RFB, ACSA acted illegally.¹⁶

Furthermore, the RFB merely refers to ACSA's transformation policy and does not indicate the precise transformation imperatives required of tenderers or how they will be evaluated. Although the court rightly held this to be unlawful, it did not refer to the requirements of the PPPFA which states that organs of state must indicate the preference points system applicable in their tender documents.¹⁷ The same goes for the 50/50 points indicated by ACSA, which is not permitted by the PPPFA 2017 Regulations.¹⁸

Lastly, in relying on the Public Finance Management Act 1 of 1999 Supply Chain Management Regulations, reg 16A, the court held that ACSA had committed an error of law which was material since its reliance on the regulations caused ACSA to not comply with s 217 of the Constitution and its applicable legislation. The court explicitly held that reg 16A is not applicable to ACSA because ACSA is a public entity to which it does not apply. The corresponding National Treasury Implementation Guide on reg 16A was accordingly not applicable and had no legal status since, accordingly to the court, it had been repealed together with the regulations from which it originated.¹⁹ As a result, ACSA was found to have contravened s 217 in failing to comply with the applicable legislation. The decision to publish the RFB and the RFB itself was set aside.

1 BA LLB LLM LLD (Stellenbosch), Lecturer, Department of Public Law & Jurisprudence, University of the Western Cape.

2 2018 (10) BCLR 1291 (CC).

3 Unreported, referred to as [2018] ZAGPJHC 454, 18 June 2018; available online at <http://www.saflii.org/za/cases/ZAGPJHC/2018/454.html>.

4 *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC).

5 Para 13.

6 The court referred to *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism v Smith* 2004 (1) SA 308 (SCA) in which the Supreme Court of Appeal held that '[a]s a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.'

- 7 Para 17.
- 8 Para 27.
- 9 Para 31.
- 10 Para 32.
- 11 [2018] 3 All SA 751 (GJ).
- 12 Para 52.
- 13 Para 55.
- 14 Para 62.
- 15 Para 79.
- 16 Para 80.
- 17 See reg 3(a) of the PPPFA 2017 Regulations published in *Government Gazette* 40553 of 20 January 2017.
- 18 See regs 6 and 7 which provide for an 80/20 and 90/10 points system only.
- 19 Para 103.

October to December 2018 (4)

JQR Public Procurement 2018 (4)

Allison Anthony ¹

1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Correct approval for transversal contracts

In the matter *State Information Technology Agency (Pty) Ltd v Premier, Eastern Cape Provincial Government*, the State Information Technology Agency (Pty) Ltd (SITA) sought to set aside a contract between the Eastern Cape Provincial Government and Liquid Telecoms, a service provider for the provision of broadband services. SITA, by way of an open tendering process, appointed a tenderer to provide the same services in the Western Cape. A subsequent service level agreement (SLA) was concluded between SITA acting as an agent for the Western Cape Provincial Government (WCPG) and Neotel (Pty) Ltd, the winning tenderer. The Eastern Cape Provincial Government (ECPG) then requested that SITA provide broadband services to schools and government buildings in the Eastern Cape. After what appeared to be slow implementation of the broadband service on the part of SITA, the ECPG commenced with a process to participate in the SLA between the WCPG and Neotel based on Treasury Regulation 16A6.6. In acting on what it perceived as tacit consent from the WCPG to participate in a transversal contract, the ECPG appointed Liquid Telecoms to provide broadband services. SITA then applied for the agreement between the ECPG and Liquid Telecoms to be set aside based on the contention that the ECPG unduly appointed Liquid Telecoms.

In answering whether the ECPG duly obtained approval for its participation in a transversal contract, the court held that the ECPG's submissions that SITA has no *locus standi* in this matter and that it has failed to comply with the Intergovernmental Framework Relations Act ² by not declaring a formal dispute in terms of the Act, cannot be upheld. The court confirmed that the SITA Act establishes SITA as the body through which all contracts relating to information technology must be procured. Furthermore, based on SITA's role established in the SITA Act, the ECPG is precluded from acquiring broadband services without the use of SITA. Therefore, it undoubtedly has standing in this matter. In response to its second submission, the court held that it has a discretion to condone a failure to declare a formal dispute in terms of the Framework Relations Act and accordingly did so. The question it was faced with, was whether the ECPG obtained approval from the relevant organ of state to participate in the WCPG contract. The court referred to Treasury Regulation 16A6.6 which provides the authority for transversal contracts and requires that written approval be obtained from the organ of state which is party to the contract. The WCPG contract and its letter to the ECPG upon requesting permission to participate clearly stated that it was an agreement between the SITA and Neotel (Pty) Ltd. The ECPG thus had to request permission from SITA and not the WCPG to participate in the contract. The WCPG's letter to the ECPG

that it did not have an objection to the ECPG's participation in the contract thus cannot be construed as permission to participate. The court held that on a reasonable interpretation of Treasury Regulation 16A6.6, unequivocal written approval from SITA and the service provider is required for valid participation in a transversal contract. Therefore, in light of the ECPG's failure to comply with these conditions, it unduly appointed Liquid Telecoms and its decision to do so is thus reviewable.

The judgment thus emphasises the importance of obtaining the unequivocal written approval from the organ of state which is party to the contract.

2.2 Locus standi

The court was once again faced with the issue of a tenderer's standing in a challenge against the validity of a tender process. In *Tupac Business Enterprises CC v Chairperson: KwaZulu-Natal Gaming and Betting Board*, Tupac Business Enterprises submitted a tender to the KwaZulu-Natal Gaming and Betting Board along with Kibe Property (Pty) Ltd in a closed invitation from the Board. The tender was rejected based on non-responsiveness. Tupac Business Enterprises then challenged the rejection of its tender and the deviated tender process. Ultimately, the first challenge was not pursued further. The court was then left to decide whether Tupac Business Enterprises had standing to challenge an alleged deviated tender process since it was not part of the process after its tender was rejected. The court referred to a number of previous judgments in which this issue was raised and held that Tupac Business Enterprises was an own interest litigant. The mere fact that it had submitted a tender and was entitled to submit a tender constituted sufficient grounds for standing in this matter, Tupac Business Enterprises argued. However, the court held that it was inconceivable that Tupac Business Enterprises could be allowed to submit a non-responsive tender, accept that such tender had been rejected and thereafter lodge a complaint about the process, while alleging a right to have the process set aside to enable a fair tender process and then have 'a second bite at the cherry'.⁵ The court then held that the tender conditions served as boxes to be ticked before a tender could be considered. A tenderer who failed to tick those boxes had no interest in the outcome of the tender since it would never be entitled to be awarded the tender. Tupac Business Enterprises had to demonstrate that it had a direct and substantial interest in the outcome of the litigation. Such direct and substantial interest meant that its existing tender must qualify to be considered in a subsequent tender process which is fairly conducted and that its tender had fair prospects of success. Since the tender did not meet these requirements, it did not have a direct and substantial interest in the matter.⁶ The court concluded that if the right person in the right proceedings sought the right remedy, the decision may well be subject to review and be set aside.

3. Literature

Anthony, A 'The use of e-procurement in South African public procurement law: Challenges and prospects' (2018) 22 *LDD* 39

Quinot, G & Williams-Elegbe, S (eds) *Public procurement regulation for 21st century Africa* (Juta 2018)

G Quinot 'The third wave of preferential procurement regulations in South Africa' 2018 (4) *TSAR* 856

1 BA LLB LLM LLD (Stellenbosch), Senior Lecturer, Department of Public, Constitutional & International Law, University of South Africa.

2 Unreported, referred to as [2018] ZAECBHC 12, 23 October 2018; available online at <http://www.saflii.org/za/cases/ZAECBHC/2018/12.html>.

3 13 of 2005.

4 Unreported, referred to as [2018] ZAKZPHC 63, 9 November 2018; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2018/63.html>.

5 Para 18.

6 Para 21.

January to March 2019 (1)

JQR Public Procurement 2019 (1)

Allison Anthony¹

1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Exhausting internal remedies

In the matter of *C & M Fastners CC v Buffalo City Metropolitan Municipality* the court was confronted with whether a failure to pursue the internal appeal process provided for in s 62(1) of the Local Government: Municipal Systems Act³ is fatal. In this matter the applicant sought an order compelling the respondent to award to the applicant the tender advertised, alternatively an order compelling the respondent to make an award in respect of the tender.

The court upheld the applicant's argument that a party who relies on s 62 must prove that rights have been affected by a final decision. Since the tender had not been finally awarded, no final decision had been made.⁴ Reference was made to a Constitutional Court judgment⁵ in which the court held that reliance on an internal remedy should not be rigidly imposed or used by organs of state to frustrate an applicant's efforts to review administrative action. It was further argued that even if s 62 was in fact applicable, exceptional circumstances existed which exempted the applicant from complying with the section. These circumstances included the delayed manner in which the respondent handled the tender, lack of responses to the applicant's repeated requests for information and unacceptable answers in its papers as to why the tender had not yet been awarded. The court upheld these arguments and found that even if s 62 was applicable, it would have been unjust and inequitable to place an obligation on the applicant to exercise a s 62 appeal.⁶ Furthermore, the exceptional circumstances referred to justified condoning of non-exhaustion of internal remedies.⁷

2.2 Evaluation and adjudication of tenders

In *Iziqhamo Zethu JV Noble Money v Walter Sisulu Local Municipality* the court discussed the purpose of the Central Supplier Database (CSD) in public tenders. In this matter, the applicant's tender was initially found to be responsive and recommended as the winning tender by the evaluation committee. According to the committee, the tax status of the fourth respondent could not be verified due to contradicting documents and, according to the CSD, the tax affairs of the company were non-compliant.⁹ However, the adjudication committee re-evaluated the submitted tenders and found that the applicant's tender was in fact non-responsive and that the fourth respondent's tender was the only responsive one. One of the requirements in the tender documents was that a current tax clearance certificate or tax compliant status pin must be supplied.¹⁰

The court held that the mistake the applicant made was to suggest that the CSD status of a tenderer's tax compliance is verified at the time of opening the tenders and should not be updated once the tenders are submitted. The purpose of the CSD is to safeguard *inter alia* against transacting with suppliers whose tax matters are not in order. If it happens that at the time the tenders are evaluated, the CSD report shows a favourable tax compliance status, there is no reason for the evaluation committee to disqualify the tenderer based on the fact that the CSD status may have been non-compliant some time ago. Such a conclusion would be favouring form over substance. Therefore, the adjudication committee was correct in conducting its own verification of the fourth respondent's CSD status.¹¹

3. Literature

Anthony, A 'Re-categorising public procurement in South Africa: Construction works as a special case' (2019) 22 (1) *Potchefstroom Electronic Law Journal* – DOI <http://dx.doi.org.ez.sun.ac.za/10.17159/1727-3781/2019/v22i0a5270>

Quinot, G 'Constitutionalising public procurement through human rights: Lessons from South Africa' in *Public Procurement and Human Rights* by O Martin-Ortega & C Methven O'Brien (Edward Elgar Publishing 2019)

1 BA LLB LLM LLD (Stellenbosch), Senior Lecturer, Department of Public, Constitutional & International Law, University of South Africa.

2 Unreported, referred to as [2019] ZAECGHC 22, 14 March 2019; available online at <http://www.saflii.org/za/cases/ZAECGHC/2019/22.html>.

3 32 of 2003.

4 Para 45.

5 *Gavric v Refugee Status Determination Officer* 2019 (1) SA 21 (CC) para 54.

6 Para 46.

7 Para 48.

8 Unreported, referred to as [2019] ZAECGHC 32, 26 March 2019; available online at <http://www.saflii.org/za/cases/ZAECGHC/2019/32.html>.

9 Para 9.

10 Para 7.

11 Para 26.

April to June 2019 (2)

JQR Public Procurement 2019 (2)

Allison Anthony¹

1. Legislation

Investigations and Special Audits Regulations to the Public Audit Act 25 of 2004 were published in GG 42368 of 1 April 2019.

2. Cases

2.1 Strict compliance with tender conditions

In the matter of *Infinite Blue Trading 29 CC t/a Motau Projects v City Power Johannesburg (SOC) Ltd*, the applicant challenged the validity of the tender process carried out by City Power. The tender advertised was for the provision of security measures to prevent loss of material and to safeguard any incomplete projects. The allegations concerned three irregularities regarding an assessment of functionality. Firstly, whether due compliance was ensured in relation to information to be disclosed about security measures. Secondly, whether due compliance was ensured in relation to information provided about a list of tools and an asset register. Thirdly, whether City Power lawfully and appropriately tested electricians for their competence and if not, whether it improperly failed one of the applicant's personnel which supposedly justified a deduction of points, leading to the applicant not winning the tender.

The applicant failed to meet the threshold score of 75 by 1 point only and was thus excluded from the rest of the tender process. The court held that the approach to determining a challenge to a tender on grounds of perpetration of irregularities is trite. It has two stages – first to declare the tender invalid if so proven and thereafter to determine an appropriate remedy.³ In response to the first enquiry, the court held that the service level agreement (SLA) concluded between the applicant and a security company in evidence of its ability to provide the required security measures was illegible and thus correctly not awarded any points.⁴ A letter attached by the applicant in which it provided information required by the tender documents, however, should have been awarded a number of points, since all the required information was indeed provided.⁵ Despite a bald allegation by City Power of failure on the part of the applicant, the latter should have received a score for the information provided in the absence of any plausible criticism of the contents of the letter.

Regarding the second enquiry, City Power alleged that the list of tools provided by the applicant lacked bar codes and as such was not awarded points for this part of the tender. However, the court held that no requirement for such bar codes exists in the tender documents.⁶ Therefore, the scoring was plainly irregular and no rational reason to score 0 was evident.⁷ On the last enquiry, the court held that several problems regarding the requirement of testing electricians existed.⁸ The requirement for testing was very vague in that no explanation of the testing process was provided; neither what the pass mark would be, nor how many points were deductible. It also did not satisfy the provisions of the Preferential

Procurement Policy Framework Act 5 of 2000 and its Regulations.⁹ To this end the court held that 'the process is an illustration of precisely what the legislation was intended to prevent – a loose slippery dimension open to facilitate manipulation of the process.' Lastly, the court questioned why the question posed to the applicant's electrician was considered a fail when the same question was answered and passed by another electrician.¹⁰ This question was not answered by City Power.

The court thus found that there were clear irregularities in the scoring and the pattern presented gave rise to reasonable suspicion of deliberate manipulation to improperly exclude the applicant.¹¹ Setting the tender aside was thus unavoidable. Temporary continuation of the service by the present successful tenderer for a period of three months whilst the tender was re-evaluated would be an adequate interim arrangement which would not cause consequential harm to the public interest.¹²

On the issue of costs, the court held that mala fides could be inferred on the part of City Power along with a lack of co-operation to expedite the litigation. Such delay amounts to an abuse of the court process. Therefore a punitive cost order was warranted.¹³ Furthermore, the conduct of the officials of City Power ought to be enquired into for integrity and competence. 'Moreover, given the public interest being served by the rooting out of irregular conduct by public officials who perpetrate such irregularities behind a cloak of anonymity and escape accountability, a report on steps taken to address such matters in the case shall be called for.'¹⁴

The court in *Hemipac Investments (Pty) Ltd v Buffalo City Municipality* once again emphasised the importance of clear and transparent tender conditions in order to enable tenderers to comply. In this matter, a tender for office accommodation was advertised. The applicant submitted a tender for use of a building of 694.4 square metres and a building of 723.8 square metres. Its offers were found to be unresponsive as it did not comply with the size requirement of 850 square metres. The court held that the requirement in the tender documents was described as 'approximately 850 square metres' and not 850 precisely.¹⁶ A table included in the tender documents indicated that only 540 square metres were required and on this basis the applicant submitted its bid.¹⁷ In the applicant's bid, it was explained that 850 square metres are, however, available. The winning tenderer, that of the second respondent, also provided for a smaller space and was afforded an opportunity to explain its lettable space, albeit not in writing. The court held that fairness in s 217 of the Constitution required that the applicant should have been afforded the same opportunity.¹⁸ In the applicant's favour, the court found that when taking into account the document as a whole, it was possible for the applicant to interpret the requirements as it did. The applicant was thus unfairly treated. It should not have been disqualified without an opportunity to be heard. The court held that '[i]t is trite law that if an administrator contemplates to take a decision which adversely affects your rights you must be afforded an opportunity to be heard before the decision is taken.'¹⁹

Another important aspect of the case was the issue of the right to reasons. In objecting to the tender award to the second respondent, the applicant requested reasons for the decision of the organ of state. It not only delayed providing such reasons but also provided an incomplete record. To this end, the court held that public bodies are obliged to give reasons for the decisions affecting people's rights both in terms of the Constitution and the Promotion of Administrative Justice Act.²⁰ These reasons must

indicate how the decision was arrived at and must not consist of mere conclusions. Full reasons will enable the person affected to decide whether or not the decision was justified.²¹

2.2 Award of preference points

The tender in *Aero-Duct Moya CC v Minister of Public Works* was for the installation of air-conditioning equipment at the provincial headquarters of the South African Police Service. The call specifically required compliance with qualification criteria for preferential procurement, specific CIDB contractor rating designations, registration on the National Treasury Central Supplier Database and submission of a valid original or certified copy of the contractor's broad-based black economic empowerment (B-BBEE) status level verification.

The applicant's bid was found to be responsive, however the second respondent's bid was declared non-responsive. Subsequent to a meeting of the bid adjudication committee (BAC), the second respondent's tender was in fact found to be responsive. On this basis the applicant sought an interdict preventing the department of Public Works from concluding an agreement with the second respondent, alternatively an order preventing the agreement from being implemented. The applicant alleged that the bid evaluation committee (BEC) and the BAC committed an irregularity in allowing the second respondent to participate in the tender process despite its tender being non-responsive. The committees also committed an error of law in failing to comply with a peremptory duty to investigate suspicions and allegations of fronting. More specifically, the applicant alleged that the BEC unlawfully allowed the dictates of a person who was not a member of the committee to influence the evaluation of the second respondent's tender and that the BAC failed to apply its mind to the original recommendation of the BEC, which was to find the tender to be non-responsive.

The reason for the initial declaration of non-responsiveness was based on the affidavit submitted by the second respondent in proof of the B-BBEE status which was signed by a director other than the director authorised to sign such documents. The affidavit was thus found to be invalid. On this issue the court held that the documents provided did not establish that the affidavit was indeed invalid. Therefore, *prima facie* the basis of the initial non-responsive determination appears to be incorrect.²³ The court held that the basis of the applicant's case was in any event not the alleged irregularity but the fact that the first respondent failed to investigate a reasonable suspicion of fronting.²⁴ The court then looked at the definition of 'fronting' in terms of the B-BBEE Act²⁵ and held that 'fronting practice' as referred to in the Act was 'a very serious irregularity which undermines the objects sought to be achieved by the preferential procurement policy sanctioned by the Constitution.'²⁶ In referring to a previous judgment on fronting,²⁷ the court found that an obligation to investigate fronting exists upon 'detecting' such fronting. This means that what is required is information that gives rise to a reasonable suspicion of fronting.²⁸ Once this threshold is established, an organ of state is obliged to act in terms of regulation 14 of the 2017 Preferential Procurement Policy Framework Act Regulations which sets out the procedure to be followed and the remedies available to the organ of state.²⁹ Based on the documents attached which indicated shareholding of the second respondent, the court found that there could be no suspicion of fronting. The minutes of the meeting in which the

second respondent's tender was declared to be responsive fell short of 'detection' in terms of the *Viking Pony* judgment.

3. Literature

Anthony, A 'Subcontracting in public procurement – impact of the 2017 Preferential Procurement Regulations on the construction industry' (2019) 30 (1) *Stell LR* 116–125

Van Eetveldt, HW 'Standing on unsteady ground: *AREVA NP Incorporated in France v Eskom SOC Ltd*' (2019) 22 April *PER/PELJ* – DOI: <https://doi-org.ez.sun.ac.za/10.17159/1727-3781/2019/v22i0a3285>

1 BA LLB LLM LLD (Stellenbosch), Senior Lecturer, Department of Public, Constitutional & International Law, University of South Africa.

2 Unreported, referred to as [2019] ZAGPJHC 169, 30 May 2019; available online at <http://www.saflii.org/za/cases/ZAGPJHC/2019/169.html>.

3 Para 6.

4 Para 10.

5 Para 11. The requirements of the tender distinguished between a disclosure of information about storage security and an SLA.

6 Para 15. The court held in para 16 that 'in the absence of an express stipulation, the reasonable reader of the specification could not be expected to have understood it to mean what has been contended on behalf of City Power.'

7 Para 17.

8 Para 18. The requirement specifically stated that the testing of electricians will be conducted to those companies that meet the threshold and that an electrician that fails the testing will automatically reduce the score.

9 GN R32 of 20 January 2017, *GG* 40553.

10 Para 19.4.

11 Para 21.

12 Paras 25–26.

13 Para 27. The court held that '[t]he consequences of delay in tender challenges is so obvious that no reasonable person can claim an unawareness of the absolute need to move swiftly. To drag one's feet in such a matter is an abuse of the court process.'

14 Para 29.

15 Unreported, referred to as [2019] ZAECELLC 13, 2 May 2019; available online at <http://www.saflii.org/za/cases/ZAECELLC/2019/13.html>.

16 Para 15.

17 Para 17.

18 Para 23.

19 Para 24.

20 3 of 2000.

21 Para 6.

22 Unreported, referred to as [2019] ZAECPHC 32, 21 May 2019; available online at <http://www.saflii.org/za/cases/ZAECPHC/2019/32.html>.

23 Para 26.

24 Para 28. This appears to be an incorrect finding of the court, as the first basis on which the applicant brought its matter to court was, as stated in para 15 of the judgment, that the BEC and BAC committed an irregularity in allowing the second respondent's tender to participate when it had been determined to be non-responsive.

25 53 of 2003. See para 30.

26 Para 31.

27 *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC).

28 Para 42.

29 Para 43.

July to September 2019 (3)

JQR Public Procurement 2019 (3)

Allison Anthony¹

1. Legislation

No important legislation relating to public procurement was enacted in the period under review. However, in the field of construction procurement law, a certain prescript applicable to procurement in the construction industry came into operation.

- Construction Industry Development Board Standard for Uniformity in Engineering and Construction Works Contracts published in GG 42622 of 8 August 2019.

2. Cases

2.1 Judicial review of tender awards: Remedies

The court in *IIAH Indiza Aviation Service (Pty) Ltd v Msunduzi Municipality* was asked to review and set aside the first respondent's decision to appoint the second respondent as a service provider pursuant to the award of a tender to provide technical and non-technical infrastructure services and, furthermore, that the tender be awarded to the applicant. The Bid Evaluation Committee (BEC) submitted that the applicant was disqualified for two reasons. Firstly, it submitted irrelevant information. Secondly, it did not submit a record of work with subcontractors in similar environments or in any other contracts as required by the tender specifications.³ The first respondent contended that the fatal defect was in the bid proposal which required that only tenderers which are 100 per cent black owned could submit a tender. This was contrary to the legislative requirement of 51 per cent and thus irregular. The applicant thus averred that it had in fact complied with regulation 4(1)(c)(i) of the Preferential Procurement Regulations,⁴ which requires a tenderer to subcontract a minimum of 30 per cent to an EME or AQE which is at least 51 per cent black owned.⁵ The 100 per cent black ownership should be regarded as *pro non scripto*, as it was not a requirement in terms of legislation. The applicant further alleged that the second respondent's tender did not comply with a number of requirements. Firstly, its Broad-Based Black Economic Empowerment (B-BBEE) certificate did not bear the commissioner of oaths' signature; secondly, the second respondent failed to provide a subcontractor's certificate; thirdly, it had submitted an expired employment equity policy; and lastly, it had no aviation radio technician.⁶

The court held that it is trite that the materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained. The court accepted that material and mandatory conditions were legally binding and may not be disregarded at the whim of the organ of state.⁷ The first respondent then correctly conceded to the setting aside of the tender award to the second respondent as mandatory requirements had not been complied with. A further challenge was to change the B-BBEE score percentage which was contrary to legislative prescripts.

When considering the appropriate remedy, the court had to determine whether exceptional circumstances based on a s 8 substitution remedy in terms of the Promotion of Administrative Justice Act⁸ were possible. It confirmed the exceptional circumstances as: when the end result is a foregone conclusion and it would serve no purpose to refer the matter back to the original decision maker; where further delays would cause undue prejudice to the applicant; where the original decision maker is biased or incompetent to such a degree that it would be unfair to expect the applicant to submit its tender to its jurisdiction again; and the willingness of the administrator to re-apply its mind to the issues at stake and change in circumstances. The court held that the separation of powers required that the court should not be so overzealous as to replace the decision of the administrator with its own decision, except in these exceptional circumstances. The court found that none of these grounds existed in this matter. It held that the second respondent did not participate in the evaluation of the tenders and was thus not the author of its own misfortune. The court furthermore did not have the requisite technical skills to evaluate the tenders. The best remedy was thus to refer the matter back to the original decision maker for reconsideration as no prejudice would be suffered by the applicant, as the service was being provided by the second respondent in terms of a previous contract.⁹

In the matter of *Member of the Executive Council of the Department of Co-Operative Governance, Human Settlements and Traditional Affairs, Free State Province v Scenic Route 802 CC and the 105 Further Respondents Listed in Annexure 1 of the Applicants Notice of Motion* the Free State Department of Human Settlements asked the court to review its decision to make payments to a number of contractors based on unlawful agreements. These contracts were alleged to be unlawful based on firstly, an improper procurement process, and secondly, payments made as part of a scheme to avoid the provisions of the Division of Revenue Act (DORA).¹¹ The applicant thus sought a declaratory order that the agreements and subsequent payments were unlawful.

Placed in context, the National Treasury allocated a budget of approximately R1.4 billion for low-cost housing to the Free State Province for the financial year 2010/2011. In terms of the DORA, the funds should be repaid to the National Revenue Fund if not spent. These funds can only be transferred with a payment schedule which has been approved by the National Treasury.¹² A proper procurement process must also have been followed or, in the case of advance payments, there must be good reasons which are approved by the National Treasury. A transfer prohibited by the DORA constitutes unauthorised expenditure in terms of the Public Finance Management Act.¹³

In deciding this matter, the court referred to the principles incumbent upon organs of state by virtue of s 217(1) of the Constitution.¹⁴ The Department was unable to spend the funding and conceived an illegal scheme to facilitate advance payment to suppliers so that the funds would not revert back to the Revenue Fund. The court held that the agreements were illegal for two reasons. First, they were concluded without proper procurement processes and the agreements formed a fraudulent scheme to avoid the consequences of the DORA.¹⁵ The court held that the fact that no procurement process was conducted was on its own a reason for the agreements and subsequent payments having been illegal. The agreements were thus declared invalid and set aside.

In *FMP Contractors (Pty) Ltd v Mangaung Metropolitan Municipality* the court had to determine whether it was permitted to review and set aside the allocation of work to contractors appointed on a panel on a rotational basis. In this matter, the applicant submitted a tender to the municipality to be placed on its panel of contractors for the construction of trunk routes. On the first allocation of work, the applicant was successful and was appointed as the contractor to perform the work. On the second allocation of work, the applicant was unsuccessful and approached the court alleging that the municipality had failed to exercise a procurement process in line with s 217 of the Constitution.

The court looked at the definition of 'acceptable tender' in terms of the Preferential Procurement Policy Framework Act¹⁷ and how to determine whether an irregularity had occurred in the procurement process.¹⁸ It was held that from the municipality's supply chain management policy and the framework agreement between the municipality and the contractors, it was clear that the process of appointment to the panel of contractors and allocation of work was done fairly and the necessary due process was followed.¹⁹ This was especially the case since the applicant had signed the agreement that work would be allocated on this basis. A further reason for not allocating work to the applicant upon the second round was because the applicant was still performing work on the first appointment, thereby making availability of contractors a problem.²⁰ The court held that the main objective criteria used by the municipality was that the tender was for a panel of contractors and awarding work on an *ad hoc* and rotational basis to those contractors on the panel. There were no irregularities and as such 'the court may not re-write a contract between the parties in terms of the other party's wishes or request.'²¹ Furthermore, the applicant was no stranger to the method used in work allocation on a rotational basis based on its long-standing relationship with the municipality.²² The applicant was thus dismissed.

In the KwaZulu-Natal division of the High Court, the applicant as the aggrieved tenderer alleged that the Supply Chain Management Policy (SCMP) of the Zululand District Municipality was *ultra vires* the Municipal Supply Chain Management Regulations promulgated in terms of the Local Government: Municipal Finance Management Act (MFMA).²³ In *Rocla (Pty) Ltd v Zululand District Municipality* the applicant alleged that para 50A of the municipality's SCMP, which sets out the powers, duties and functions of the Municipal Bid Appeals Tribunal and matters incidental thereto was not complied with. This includes the power to make a final binding decision to confirm, vary or set aside a decision of the Bid Adjudication Committee (BAC) or the Municipal Manager (MM). If it decides to use its powers in terms of this paragraph, it must make an order it considers appropriate regarding the manner in which the matter is to be resolved.²⁵

In this matter, two awards were made by the Tribunal. The first entailed a successful challenge to a tender award made by the municipality. The tender challenged was set aside and any contract concluded pursuant to the award was cancelled. The second award dealt with the submissions made by the first and fourth respondents concerning the competence of the Tribunal to deal with the appeal in the first award. The allegation was made that the Tribunal was not properly constituted and therefore could not decide the appeal (award one). The Tribunal found that provisions of para 50A(2) of the SCMP were in fact not complied with. The application for review in this court was brought by the applicant for

a *mandamus* requiring the first respondent to appoint a properly constituted Tribunal upon its refusal to do so. It also requested the court to award the tender to the applicant.

The court held that the starting point was to determine whether the Tribunal had the requisite powers to deal with the issues placed before it and decided that in terms of para 50A(3) of the SCMP, it had.²⁶ The Tribunal thus had the power to grant the first award. However, if the first award did have legal effect, it would mean that the impugned tender award would be set aside, the contract cancelled, and the process re-started as found by the Tribunal. The relief sought in this application could thus not be awarded unless the first award by the Tribunal was set aside. The question is therefore at what point can it be said that an award signed by the Tribunal has legal effect? If the first award was legal, it would have made the Tribunal *functus officio*, thus the second award would have no legal force as the Tribunal lacked the power to issue it.²⁷ To this end, the SCMP was silent on when it can be said that the Tribunal has made a final, binding decision.²⁸ The court accepted the argument that the first decision by the Tribunal was in fact a 'decision' as defined in s 1 of the Promotion of Administrative Justice Act (PAJA)²⁹ and held that because the award was not made known to the parties to the appeal, it had no legal effect.³⁰ This was based on the legal requirement in s 1 of PAJA, which is that a decision is a final one which has an external, legal effect when communicated to those affected by it.³¹ Therefore, the first award made by the Tribunal could be revisited and changed as it was not yet final. Since it was sufficient for only two or three members of the Tribunal to make a binding decision, the second award was accordingly of legal effect. This meant that the Tribunal had not finally declared the impugned tender award to be invalid and set aside and as such the impugned decision stood until set aside.³²

The next question was whether the court could remit the matter for reconsideration in whole or in part or substitute the impugned decision with one awarding the project to the applicant.³³ This, the court held, depended upon the existence of exceptional circumstances which justified the remedy of substitution, as this test guards against a court falling foul of the separation of powers principle.³⁴ The court found that it was in as good a position as the first respondent to award the tender. The first respondent refused to appoint a properly constituted Tribunal, refused to award the tender to the only party demonstrably able to perform the work, attempted to place the blame for failure to expedite appointment of a contractor on a number of MMs and refused to acknowledge the inability of the fourth respondent to be appointed. In these circumstances, there existed the concern that there might be bias on the part of the first respondent. Furthermore, if the matter were to be remitted, it may generate a further application for review to court and thus further delay the delivery of the work. The requirement of exceptional circumstances was thus met.³⁵ The tender was accordingly awarded to the applicant.

2.2 Strict compliance with tender conditions

In the matter of *Public Discipline and Integration of Technology Cape Town CC t/a PDIT v City of Cape Town Municipality* the Western Cape High Court once again emphasised the importance of setting clear and unambiguous tender specifications. The applicant in this matter wrongly interpreted the requirements for Broad-Based Black Economic Empowerment points in subcontracting, which led to its being disqualified from the tender process. It was later discovered that the applicant and another

tenderer misinterpreted the requirements and submitted incorrect figures to the municipality based on this mistake. Upon reading the requirements, the court found that it was indeed possible for a tenderer to interpret the specifications as the applicant had. In absence of such error, the applicant may well have been the successful tenderer. The court thus held that the requirement that a tender document be reasonably clear serves important requirements of policy. A tenderer must know what information is expected of it so that the merits of its tender can be fairly assessed. The organ of state must be able to compare 'like with like' so as to ensure that it receives the best value for money, especially in light of preference considerations designed to address historical disadvantage.³⁷ The court further held that where a tender document is unclear, it may often be difficult for the organ of state to know what the tenders would have contained, had all the tenderers understood the document in the way it was intended.³⁸ The court referred to the *Allpay* judgment in the Constitutional Court³⁹ in which the court held that the purpose of a tender is not to reward tenderers who are clever enough to decipher unclear requirements, but to elicit the best solution through a process that is fair, equitable, transparent, competitive and cost-effective.⁴⁰ Furthermore, the 'central element is to link the question of compliance to the purpose of the provision.'⁴¹ The materiality of the irregularities is determined by assessing whether the purposes of the tender requirements have been substantially achieved. The court then referred to another judgment where it was held that a public tender process 'should not be so interpreted and applied as to avoid both uncertainty and undue reliance on form, bearing in mind that the public interest is, after giving due weight to preferential points, best served by the selection of the tenderer who is best qualified by price'.⁴²

The decision to award the tender to the second respondent was thus reviewed and set aside and substituted with an award of the tender to the applicant.⁴³ This award was made based on the way the applicant illustrated it would have dealt with the requirement, but for the ambiguity. This was also known by the Bid Evaluation Committee (BEC) upon explanation. The applicant would undoubtedly have been awarded 20 preference points and thus have achieved 100 out of 100 points for the tender overall, making it the winning tenderer. This was based on a calculation of points by the BEC. Since no objective criteria existed to award the tender to a tenderer who is not the highest scoring tenderer, the award would have gone to the applicant. The winning tenderer was awarded the tender based solely on the erroneous points awarded to it. As such, the court found itself to be in as good a position as the BEC to make the decision to award the tender to the applicant since the matter, if remitted, would be a foregone conclusion. Furthermore, the choice of the winning tenderer was not a policy-laden or polycentric assessment. Any other result would have been unfair.⁴⁴

1 BA LLB LLM LLD (Stellenbosch), Senior Lecturer, Department of Public, Constitutional & International Law, University of South Africa.

2 Unreported, referred to as [2019] ZAKZPHC 51, 23 July 2019; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2019/51.html>.

3 Paras 6–7.

4 Preferential Procurement Policy Framework Act 5 of 2000.

5 Para 9.

6 Para 11.

7 Para 12.

8 3 of 2000.

9 Para 16.

10 Unreported, referred to as A241/2016, [2019] ZAFSHC 147; 26 August 2019; available online at <http://www.saflii.org/za/cases/ZAFSHC/2019/147.html>.

11 1 of 2010.

12 See s 15 of DORA.

13 1 of 1999.

14 These are that all contracts concluded by organs of state for the provision of goods and services should be fair, equitable, transparent, competitive and cost-effective.

15 Para 9.

16 Unreported, referred to as [2019] ZAFSHC 149, 29 August 2019; available online at <http://www.saflii.org/za/cases/ZAFSHC/2019/149.html>.

17 5 of 2000.

18 To this end, the court referred to previous judgments such as *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) with regard to when a decision by an administrator is justifiable in para 31 of the judgment; *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) for what the standard of rational decision-making is; *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) for a further enquiry into rationality in para 32 of the judgment and *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) with regard to the duty of an organ of state to act fairly in a tender process in para 33 of the judgment; and lastly *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA).

19 Para 35.

20 Para 42.

21 Para 39.

22 Para 42.

23 56 of 2003.

24 Unreported, referred to as [2019] ZAKZPHC 64, 30 September 2019; available online at <http://www.saflii.org/za/cases/ZAKZPHC/2019/64.html>.

25 See para 15 of the judgment.

26 See para 15.

27 Para 17.

28 Para 20.

29 3 of 2000.

30 Para 25.

31 See para 24 of the judgment.

32 Para 26.

33 Para 31.

34 Para 32.

35 Para 37.

36 Unreported, referred to as [2019] ZAWCHC 126, 20 September 2019; available online at <http://www.saflii.org/za/cases/ZAWCHC/2019/126.html>.

37 Para 61.

38 Para 62.

39 *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC).

40 See para 92 of the *Allpay* judgment.

41 The court refers in para 62 to paras 30 and 58 of the *Allpay* judgment.

42 See *Minister of Social Development v Phoenix Cash & Carry – Pmb CC* [2007] 3 All SA 115 (SCA) para 2.

43 Para 89.

44 Paras 81–85.

October to December 2019 (4)

JQR Public Procurement 2019 (4)

Allison Anthony ¹

1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Non-compliance with statutory provisions

In the matter *M W Asset Rentals (Pty) Ltd v Dr Kenneth Kaunda District Municipality*, the municipality concluded a rental agreement with Toshiba for a period of 36 months. M W Asset Rentals (Pty) Ltd sued as a cessionary of the claim ceded to it by Bakopane Information Systems CC trading as Toshiba Office Systems and Technology ('Toshiba'). The municipality complied with its contractual obligations for 30 months, after which it wrote to Toshiba that the rental agreement was invalid and void *ab initio* based on the fact that the municipality did not follow a lawful procurement process when it concluded the agreement. ³ The municipality thus unilaterally stopped making payments in terms of the agreement.

The municipality argued that for any procurement contract to be valid, all legislative provisions applicable must be complied with and failing to do so results in the contract being invalid and therefore unenforceable. ⁴ They further relied on the argument made in the *Qaukeni* matter ⁵ that a procurement contract for municipal services concluded in breach of provisions which regulate such contracts and are designed to ensure transparent, cost-effective and competitive tendering processes in the public interest, are invalid and cannot be enforced. ⁶ Furthermore, the municipality relied on the legal principle that an organ of state may approach a court to have its own decision declared invalid. ⁷

The argument made by the applicant was that a decision by an organ of state to award a tender to a private party constitutes an administrative action. It then relied on the *Oudekraal* judgment ⁸ in which the court held that all administrative action is presumed to be valid and enforceable until set aside by a court of law. ⁹ Therefore the contract *in casu* is valid and enforceable until set aside in judicial review proceedings. Based on this, the contract has legal consequences which cannot simply be ignored. The applicant submitted that even if the administrative action was unlawful, it continues to produce valid and enforceable consequences until set aside on review. ¹⁰ Simply ignoring administrative actions thought to be invalid cannot be tolerated in a constitutional state based on the rule of law. ¹¹

The court held that in relying on the judgments referred to by the applicant, even if the municipality did not comply with s 217(1) of the Constitution ¹² and related legislation, and the action that led to the rental agreement was unlawful, the agreement must still be regarded as valid and enforceable until it is set aside by a court in judicial review proceedings. ¹³ The municipality was further not entitled to simply

treat the rental agreement as invalid even if it genuinely thought the procurement process to have been unlawful. Therefore, it was not entitled to unilaterally stop payments. Since no review proceedings were instituted by the municipality, the agreement stands and has legal consequences. ¹⁴

The court held that unlawful administrative actions can only be set aside after all the facts have been considered, especially the possible consequences and the impact on the private party and potential third parties. That is why administrative actions are, at times, not set aside even when they are found to be unlawful. ¹⁵

Although the cession agreement was not challenged in this matter, the court held that the administrative action, though potentially unlawful, remains valid and enforceable with enforceable legal consequences. ¹⁶ Therefore, the cession agreement would be valid. ¹⁷ As a result, the rental agreement was valid and enforceable until set aside by a court of law. ¹⁸ The municipality was obliged to pay the remaining six months of rent owed to the applicant.

2.2 Remedies

In *Exilaclox (Pty) Ltd v MEC, Provincial Department of Roads & Public Works, Northern Cape Province*, the applicant requested for the respondent to be ordered to immediately proceed with the implementation of a tender that was awarded to the applicant. This matter hinges on the interpretation of what the applicant understood to be a substitution order. In a previous judgment, the court set aside the initial award of the tender to Alkara 79 CC and declared the applicant to be the 'preferred bidder' in respect of the tender. The respondent argued that there is a difference between the words 'the Applicant is declared the preferred bidder' and 'the Applicant is awarded the tender.' ²⁰ Being declared a preferred bidder cannot be translated to mean that a tender has been awarded. The court held that preferred bidder status in procurement matters precedes the actual award of a tender. At the former stage, no final award of a tender is made. The preferred bidder is the party with whom a contract may eventually be entered into as part of the finalisation of the tender. This is the position in which the applicant finds itself. It did not yet have the contract. ²¹ Furthermore, a tender award was never made to the applicant – not by the respondent or the court. The court was thus not at liberty to make the order sought by the applicant, which is to order the respondent to immediately proceed with the implementation of the tender that was allegedly awarded to the applicant. ²² The court relied on the rules of statutory interpretation which were laid down in previous judgments. ²³ Based on this, the court found that the judges pronouncing on the review case in this matter were alive to the distinction in meaning between a decision to award a party a tender and a decision to declare a party a preferred bidder. ²⁴ This was clear from the language in its judgment. ²⁵ Therefore, an interpretation that the words 'preferred bidder' were intended to mean that the tender was awarded to the applicant, does not accord with the clear language and intention of the court. ²⁶

3. Literature

Anthony, A 'Standard of care and liability of public procurement officials: blessing or curse?' 2019 (3) *Obiter* 140–153

Quinot, G & Williams-Elegbe, S (eds), *Public Procurement Regulation in Africa: Development in Uncertain Times* (LexisNexis 2019)

Shai, L; Molefinyana, C & Quinot, G 'Public Procurement in the Context of Broad-Based Black Economic Empowerment (BBBEE) in South Africa—Lessons Learned for Sustainable Public Procurement' (2019) 11(24), 7164 *Sustainability* 1–27 <https://doi-org.ez.sun.ac.za/10.3390/su11247164>

Williams-Elegbe, S 'Public Procurement, Corruption and Blockchain Technology in South Africa: A Preliminary Legal Inquiry' in G Quinot & S Williams-Elegbe (eds) *Public Procurement Regulation in Africa: Development in Uncertain Times* (LexisNexis 2019)

1 BA LLB LLM LLD (Stellenbosch), Senior Lecturer, Department of Public, Constitutional & International Law, University of South Africa.

2 Unreported, referred to as [2019] ZAGPPHC 605, 27 November 2019; available online at <http://www.saflii.org/za/cases/ZAGPPHC/2019/605.html>.

3 Para 7.

4 Para 9.

5 *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 (1) SA 356 (SCA).

6 See para 10 of the *M W Asset Rentals (Pty) Ltd* judgment.

7 Paras 13–14.

8 *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

9 Para 16 of the *M W Asset Rentals (Pty) Ltd* judgment.

10 To this end, the applicant referred to the Constitutional Court judgment of *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) in which the court held that if administrators were allowed to simply disregard actions by peers, subordinates or superiors if they consider them mistaken, they would create confusion and conflict to the detriment of the administration and the public. See para 89 of this judgment.

11 Para 19.

12 This section provides that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

13 Para 20.

14 Para 21.

15 Para 23. To this end, the court referred to the infamous SASSA judgment as an example of unlawful administrative action which was not set aside. See *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC).

16 Para 25.

17 See para 27.

18 Para 34.

19 Unreported, referred to as [2019] ZANHC 58, 22 November 2019; available online at <http://www.saflii.org/za/cases/ZANHC/2019/58.html>.

20 Para 23.

21 Para 34.

22 Para 35.

23 The court refers to *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) in which the court held that '[t]he basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules ... If ... the meaning of the judgment order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it'. See paras 304D–F of this judgment.

24 Para 43.

25 The language the court refers to is 'Alkara was again found to be the most successful bidder and was awarded the tender'; 'the decision to award the bid to Alkara stands to be reviewed and set aside'; and '[i]t is common cause that the Bid was awarded to Alkara 79'. See paras 43–45 of the judgment.

26 Para 47.

January to March 2020 (1)

JQR Public Procurement 2020 (1)

Allison Anthony ¹

1. Legislation

The draft Public Procurement Bill, 2020 was published for public comment in GG 43030 of 19 February 2020.

2. Cases

2.1 Application of s 217 of the Constitution

The court in *Airports Company South Africa SOC Ltd v Imperial Group Ltd* was tasked with determining whether a particular procurement fell within the purview of s 217 of the Constitution. Airports Company South Africa (ACSA) is a public entity established in terms of the Airports Company Act ³ and an organ of state in terms of s 239 of the Constitution. ACSA published a request for bids (RFB) in terms of which members of the public were invited to submit bids or tenders for the hiring of 71 car rental kiosks and parking bays at 9 airports operated by ACSA. Imperial submitted a tender which was to be evaluated in four stages. ⁴ Imperial launched a review of the RFB based on its belief that the pre-qualification criteria and several of the provisions in the RFB contravened s 217 of the Constitution and procurement legislation. ⁵ The RFB specifically provided that the 100 points that would be awarded to each tender would consist of 20 points for price in respect of rental for the kiosks, 30 points for price in respect of rental for the parking bays and 50 points for Broad-Based Black Economic Empowerment (B-BBEE) scorecard. This, Imperial contended, contravened the Preferential Procurement Policy Framework Act (PPPFA). ⁶

ACSA submitted that s 217 was not applicable since it was merely granting concessions to bidders who were paying for it and not procuring or contracting for goods and services. ⁷ It further contended that s 217 was only applicable where an organ of state was incurring an expense, which it is not doing in this case. Therefore, compliance with s 217 and the PPPFA was not needed. ⁸ ACSA held that even if s 217 was applicable, the PPPFA was not, as ACSA was not paying bidders for goods and services. It also contended that there was nothing in the language of s 217 which indicated that the disposal and letting of state assets constituted procurement and thus fell within the ambit of s 217 and the applicable procurement legislation. ⁹ It relied on certain provisions of the Public Finance Management Act (PFMA) ¹⁰ in arguing that these provisions require organs of state to have 'procurement and provisioning' systems. ACSA alleged that the use of these two distinct words indicated that there is a difference between procurement and provisioning and that if no such distinction existed, only the word 'procurement' would have been used by the legislator. ¹¹

The court held that the Constitution is the supreme law and all other law is subject to it. Therefore, legislation cannot be used to interpret constitutional provisions. This means that

the PFMA cannot be invoked to give meaning to s 217 of the Constitution. The language of s 217 is clear and unambiguous. The court found that the ordinary meaning of 'procure' is to obtain. It referred to the UNCITRAL Model Law on Public Procurement which defines procurement as 'the acquisition of goods, construction, or services by a procuring entity'.¹² Procurement is thus not limited to state expenditure. Moreover, s 217 of the Constitution clearly indicates that procurement refers to instances where organs of state 'contract for goods and services'.¹³ The court held that the comparison of the words 'procurement' and 'provisioning' cannot assist ACSA in its argument either, since the definition of the latter is equally wide since it simply means 'to obtain provisions'. It thus applies equally to obtaining goods for oneself and others. Furthermore, the object of the PFMA to which ACSA is bound, is to 'secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies'. Various provisions of the PFMA attest to the fact that acquisition of revenue by the state is part of the procurement process. ACSA can therefore not rely on the PFMA in its argument that procurement is confined to instances where organs of state are expending funds.¹⁴

The court held that the wording of the RFB clearly indicated that ACSA intended to 'contract for goods and services'. ACSA's averment that the granting of concessions for car rental did not amount to contracting for goods and services within the meaning of s 217 amounts to an elevation of form over substance.¹⁵ Furthermore, to contend that the word 'for' after the word 'contracts' in s 217 means that procurement is only for oneself and not for third parties, is to unnecessarily strain the ordinary meaning of the words in the section.¹⁶ The court then held that:

'what determines whether a transaction amounts to procurement within the contemplation of s 217 of the Constitution is the true nature of the entire transaction (the real substance) and not the form or label attached thereto by the parties.'¹⁷

Therefore, s 217 was in fact applicable to the ACSA's RFB.

Although related to the question of lawfulness put before the court, it remains relevant for public procurement law. The court held that from the definition of 'public entity' in the B-BBEE Act¹⁸ ACSA is bound by the Act which provides that the Minister may exempt a public entity from its provisions after consultation or allow the entity to deviate from the rules. Objectively verifiable facts must inform such an exemption or deviation and must be published in the *Government Gazette*.¹⁹ Therefore, it is not open for an organ of state to design its own custom-made set of qualification criteria that deviate from the B-BBEE Act. ACSA had not such permission from the Minister and in effect gave themselves a power given to the Minister in legislation.²⁰ Where the PPPFA is concerned, the court held that the 50/50 points split in ACSA's RFB contravenes the provisions of the PPPFA and was thus unlawful.²¹

In the matter of *Swissport South Africa (Pty) Ltd v Airports Company South Africa SOC Limited*,²² the application of s 217 of the Constitution²³ was the matter at issue. Swissport sought to review and set aside the invitation for tenderers to submit proposals to provide ground handling services at all Airports Company South Africa (ACSA) airports. ACSA is an entity listed in Schedule 2 to the Public Finance Management Act (PFMA)²⁴ and is an organ

of state for purposes of s 239 of the Constitution and the Promotion of Administrative Justice Act (PAJA).²⁵ The invitation for airport handling services stated that ACSA was not conducting a procurement process pursuant to the Preferential Procurement Policy Framework Act (PPPFA)²⁶ but would apply a procurement process that is fair, equitable, transparent, competitive and cost-effective.²⁷ Therefore, ACSA was not conducting a 'conventional' procurement system and as such a total of 100 points would be awarded to tenderers. A maximum of 60 points would be for technical evaluation and a maximum of 40 for Broad-Based Black Economic Empowerment (B-BBEE).²⁸ The invitation to tender made it clear that the PPPFA was not applicable to this contract. Swissport sought to set aside the invitation in that it did not comply with the PPPFA and its Regulations.²⁹ The question thus became whether s 217 and the PPPFA were applicable to this tender.

ACSA contended that the successful tender would provide the service to the airlines operating at ACSA airport and that they would charge the airlines for the service directly. There is thus no flow of funds through ACSA.³⁰ Swissport argued that when an organ of state outsources its functions, it 'contracts for goods and services' as contemplated in s 217(1) of the Constitution. The flow of funds was therefore irrelevant.³¹ The court relied on the *Imperial* matter³² in which the Supreme Court of Appeal held that whether a transaction amounts to procurement within the meaning of s 217 of the Constitution depends on the true nature of the entire transaction, meaning its substance, and not what it is labelled to be by the parties involved.³³ In applying this reasoning, this court thus held that the transaction involved is ACSA outsourcing its obligations in terms of the ACSA Act and contracting for the provision of public services at its airports.³⁴ Furthermore, ACSA makes its property available for the services to be performed while the airlines pay for the service. The invitation contemplates that ACSA will contract for the services for the benefit of third parties. In doing so, ACSA is performing its statutory duties in terms of the ACSA Act. Therefore, the substance of the transaction is the procurement of goods and services and falls within the ambit of s 217 of the Constitution and the procurement legal framework.³⁵ The court thus confirmed the importance of regarding substance over form. The invitation to tender published by ACSA was thus invalid and set aside.

2.2 Joinder

In the heated series of *Westwood* judgments, the court in the latest matter *eThekweni Municipality v Westwood Insurance Brokers Proprietary Limited* pronounced upon the lack of joinder of procurement officials against whom a personal costs order was made in the court *a quo*. To this end, this court held that it was not for the court *a quo* to regard itself as constitutionally obligated to protect the citizens of the municipality in ordering the officials to pay for the costs of the judgment and not the taxpayers as would normally be the case.³⁷ This was so particularly because a constitutional complaint was not raised on the papers. By the same token, the adverse costs order against the officials was not ordered and thus not addressed.³⁸ The calling of affidavits by way of *rule nisi* by the court *a quo* further did not assist the fact that none of the issues raised in the main judgment were open for debate. However, the court *a quo* recognised the need for representations to be made despite finding that the costs order was permissible, based on the fact that representations by the affected parties could have been made.³⁹ This court held that the

fact that the court *a quo* required only adequate notice and not an opportunity for representation through joinder was incorrect.⁴⁰

The court further held that joinder was 'absolutely central' to any process beyond the discrete *lis* placed before it.⁴¹ Joinder was vital and not a mere formality since it carried with it the right to a fair hearing and observed a fundamental principle of the rule of law that no one should be condemned without a hearing or a reasonable opportunity to state their case.⁴² This is so because the parties were not present in the litigation or submissions that were made and thus had no opportunity to proffer a version of their own. After delivery of the main judgment, varying periods of time were given to officials to respond. Some became aware of it later than others and were not informed of their right to legal representation. One party in particular was not made aware of the judgment and thus not given an opportunity to deliver an affidavit. None of the parties were presented with a list of questions or queries related to the potential liability of costs.⁴³ Instead, the court made adverse inferences and conclusions from facts that were never properly proved.⁴⁴ The court held that the tenor of the court *a quo*'s judgment was that while the search for corruption was fruitless, ignorance, incompetence and negligence were established. However, no finding of *mala fides* or gross negligence or dishonesty was made.⁴⁵ The appeal therefore succeeded.

2.3 Regulation 32 'piggy-back' procurement

In the matter of *Contour Technology (Pty) Ltd v Mamusa Local Municipality* the court was asked to determine the lawfulness of a service level agreement (SLA) concluded in terms of regulation 32 of the Municipal Supply Chain Management Regulations to the Local Government: Municipal Finance Management Act (MFMA).⁴⁷ This regulation provides that a municipality may procure goods or services for the municipality under a contract secured by another organ of state subject to certain conditions.⁴⁸ Mamusa Municipality contended that it complied with all these conditions. Although the municipality accepts that the general method of procurement is through competitive bidding, it relied on regulation 16.A6.4, read with the relevant National Treasury instruction note, which it alleged contains an exception to this general position in certain specified circumstances and the emergency the municipality experienced at the time constituted such circumstance.⁴⁹ If any mistake was in fact made, it was made *bona fides* and the effect of any finding of unlawfulness should be suspended.

The court held that the SLA exceeded R200 000 in value and as such must be appointed in terms of a competitive bidding process in line with regulation 12(1) of the Municipal Supply Chain Management Regulations. Regulation 36 provides for procurement in cases of emergency.⁵⁰ The court held that there were a number of problems with the municipality having relied on regulation 32 for this procurement. Regulation 32 does not permit the municipality to contract directly with the supplier. The municipality effectively takes the place of the other organ of state in its obligations towards the provider. However, Mamusa Municipality contracted directly with Cigicell who was the vendor of prepaid electricity for the municipality.

The court further held that there was no proof that the other organ of state had in fact held a competitive bidding process in the award of its SLA to Cigicell or that Mamusa Municipality had no reason to believe that it had not held such a bidding process. Although the other organ of state had a fire at its building, the court held that there were no reasons provided as to why the bid documents could not be obtained. It was thus not sufficient for the municipality to simply allege that the conditions in regulation 32 had been satisfied.⁵¹ The court held that despite the fact that Cigicell provided a portion of the invitation to bid, a letter of award from the other organ of state, and a letter from the municipality requesting the organ of state to confirm the process followed to appoint Cigicell. This, however, fell short of the requirements in regulation 32, the court held. Therefore the SLA between the municipality and Cigicell was unlawful.⁵² Furthermore, the municipality failed in proving that a benefit or discount would be gained from relying on a regulation 32 procedure. The only benefit proffered was the avoidance of a lengthy competitive bidding process in the face of its emergency with Eskom. Based on this lack of sufficient evidence, the SLA was unlawful.⁵³ Lastly, no proof was provided that the organ of state consented to the municipality's procurement of Cigicell's services under regulation 32.⁵⁴ For practical purposes, based on the fact that the matter was heard when only 1 month (of the 36 months) was left of the SLA, although unlawful, it was not set aside. The court held that a competitive bidding process should commence as soon as possible in order to comply with s 33(1) of the MFMA which provides that no contract should exceed 36 months.

3. Literature

Anthony, A 'The legal nature of supply chain management instruction notes, practice notes and circulars' 2019 6(2) *African Public Procurement Law Journal* 69

Anthony, A 'The public/private divide in South African construction procurement law: the suitability of the private law of contract' 2019 33(2) *Speculum Juris* 85

Quinot, G & Williams-Elegbe, S 'Some African responses to public procurement for and during COVID-19' (2020) 30 (4) *Public Procurement Law Review* 232

Williams-Elegbe, S 'The Implications of Negotiated Settlements for Debarment in Public Procurement: A Preliminary Inquiry' in Abiola Makinwa and Tina Søreide (eds) *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar, 2020)

Williams-Elegbe, S *Asian Development Bank Sanctions Process* (2020) Max Planck Encyclopaedia of International Procedural Law. Available from <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3178.013.3178/law-mpeipro-e3178?rskey=wcmjY6&result=1&prd=MPIL>

1 BA LLB LLM LLD (Stellenbosch), Senior Lecturer, Department of Public, Constitutional & International Law, University of South Africa.

2 2020 (4) SA 17 (SCA).

3 44 of 1993.

4 See para 2 of judgment in which the four stages are indicated as stage one in which pre-qualification requirements would be evaluated, stage two in which functionality would be evaluated, stage three at which price and preference would be evaluated and stage four at which 'transformation imperatives' would be evaluated.

5 Imperial specifically alleged that the decision to publish the RFB was unlawful, unreasonable, inconsistent with the Constitution and invalid. It primarily relied on the grounds of review in the Promotion of Administrative Justice Act 3 of 2000 and in the alternative, the principle of legality. To this end, it was alleged that the challenge was brought prematurely as no final decision as to the successful bidder had yet been made. To this the court held in para 16 of the judgment that a bidder who did not meet the pre-qualification criteria would be disqualified from the process. It relied on the *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd* 2012 (2) SA 16 (SCA) para 20 in which the court held that the impact of an administrative action is important in considering whether the matter is ripe for challenge and not whether the decision is preliminary or part of a layered process. Therefore, Imperial's challenge was not premature, as its rights would be adversely affected as required by the definition of administrative action in s 1 of PAJA.

6 5 of 2000.

7 Para 14.

8 Para 15.

9 Para 21.

10 1 of 1999. The provisions relied upon were ss 38(1)(a)(iii), 51(1)(a)(iii) and 76(4)(c).

11 Para 21.

12 Section 2(j) of the Model Law.

13 Para 22.

14 Para 23.

15 Para 25.

16 Para 26.

17 Para 26.

18 53 of 2003.

19 Para 36.

20 Para 38.

21 Para 49.

22 Unreported, referred to as [2020] ZAGPJHC 70, 2 March 2020; available online at <http://www.saflii.org.za/za/cases/ZAGPJHC/2020/70.html>.

23 Section 217(1) provides that when organs of state contract for goods and services, they should do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

24 1 of 1999.

25 3 of 2000.

26 5 of 2000.

27 See para 5 of the judgment.

28 Para 5. It should be noted that the PPPFA is legislation enacted in terms of s 217(3) of the Constitution which states that preference *must* be awarded in terms of national legislation. The Act prescribes that 80 or 90 points be awarded for price and 20 or 10 points for B-BBEE depending on the value of the contract. Therefore, the 60/40 system used in this case was not permissible in terms of the PPPFA.

29 Para 9.

30 Para 8.

31 Para 14.

32 *Airports Company South Africa SOC Ltd v Imperial Group Ltd* [2020] 2 All SA 1 (SCA).

33 See para 63 of the majority judgment.

34 Para 21 of this judgment.

35 Para 21.

36 Unreported, referred to as [2020] ZAKZPHC 2, 31 January 2020; available online at <http://www.saflii.org.za/za/cases/ZAKZPHC/2020/2.html>.

37 Para 30.

38 Para 34.

39 Para 35.

40 Para 35.

41 Para 36.

42 Para 43.

43 Para 44.

44 Para 45.

45 Para 49.

46 Unreported, referred to as [2020] ZANWHC 3, 7 February 2020; available online at <http://www.saflii.org/za/cases/ZANWHC/2020/3.pdf>.

47 56 of 2003.

48 Regulation 32(1). These conditions are from (a) to (d) that the contract has been secured by the other organ of state by means of competitive bidding; the municipality has no reason to believe that the contract was not validly procured; there are demonstrable discounts or benefits for the municipality in concluding a contract under this regulation and the other organ of state has consented in writing.

49 Para 21.

50 The emergency experienced by the municipality was a lack of income from electricity due to faulty electricity meters. Citizens were thus using electricity without paying for it. Consequently, the municipality failed to pay Eskom for electricity supplied and experienced interruptions in electricity provision, putting many businesses, schools and jobs at risk.

51 Para 33.

52 Paras 34–35.

53 Para 36.

54 Para 37.

April to June 2020 (2)

JQR Public Procurement 2020 (2)

Allison Anthony ¹

1. Legislation

No important legislation relating to public procurement was enacted in the period under review.

2. Cases

2.1 Strict compliance with tender conditions

The issue of strict compliance with tender conditions was once again raised before the Supreme Court of Appeal in the matter of *Oranje Watersport CC v Dawid Kruiper Local Municipality*. ² This matter concerned the review of a tender award for the sale of immovable state property. One of the requirements for tender submission was that the tenderers had to provide a guarantee from a registered financial institution which would serve as proof that the tenderer qualified for financing to purchase and develop the property. ³ The tender submitted by Oranje Watersport CC was found to be non-responsive for lack of such guarantee. Oranje Watersport CC instituted review proceedings for the judicial review of the award of the tender to Upington Hotel. It was alleged that the winning tenderer's tender should have been found to be non-responsive and as such should not have been awarded the contract. Upon inspecting the tender documents submitted by Upington Hotel, it was alleged that the document intended to be the guarantee required in the tender conditions, was in fact not a guarantee. The court looked at the dictionary definition of the word 'guarantee' which meant 'an assurance to pay' or 'promise to pay in a certain event'. ⁴ The document submitted by Upington Hotel did not constitute a guarantee in this sense of the word, which meant that it did not comply with the tender conditions and its tender should have been declared non-responsive. ⁵ The award of the tender to Upington Hotel was thus set aside and the resultant contract declared invalid.

2.2 Fraudulent contracts

In the matter of *Namasthethu Electrical (Pty) Ltd v City of Cape Town* the Supreme Court of Appeal was confronted with whether an arbitration clause in a procurement contract concluded due to fraudulent misrepresentation and subsequently cancelled can survive the invalidity of the contract. ⁷ The court held that it is trite 'that fraud is conduct which vitiates every transaction known to the law.' ⁸ Once the agreement has been rescinded, the arbitration clause cannot stand because the clause was embedded in a fraud-tainted agreement. To enforce such a provision would be offensive to justice. ⁹ However, in relying on previous case law, ¹⁰ this might change where the parties made specific provision in the contract for such a dispute being referred to arbitration. Therefore, the question to be answered is whether there is clear and unequivocal language in the contract or the arbitration clause itself, which provides for this kind of dispute to be addressed by

arbitration.¹¹ In other words, can it be inferred that the parties foresaw a possible dispute regarding whether the agreement was induced by fraud, in which event the City of Cape Town would be bound to participate in certain dispute resolution procedures. This, the court held, must be determined having due regard to the context in which the contract was concluded. This means that the contract must be given a sensible commercial meaning.

The specific clause relied upon in this matter deals with termination for failure to meet contractual obligations, which is different from termination based on fraud. A notice of default must be provided in the case of breach of contractual obligations prior to termination of the contract. Fraud, on the other hand, is a separate and distinct basis for terminations which has not been provided for in this contract.¹² The court held that it was noted in the *North East Finance (Pty) Ltd* judgment¹³ that in order for the validity of a contract terminated for fraud to be determined by reference to adjudication, the contract must specifically say so, or otherwise clearly indicate as such. In this case, the contract does not. Therefore, the referral of the dispute to arbitration for adjudication was invalid and unlawful.¹⁴

3. Literature

Anthony, A 'South African infrastructure procurement under the new Public Procurement Bill' 2020 7(1) *African Public Procurement Law Journal* 1-9

Quinot, G & Williams-Elegbe, S (eds), *Public Procurement Regulation in Africa: Development in uncertain times* (Lexis Nexis 2020)

Williams-Elegbe, S 'An uncertain future for debarment in South Africa: An analysis of the debarment provisions in the 2019 draft Public Procurement Bill' 2020 7(1) *African Public Procurement Law Journal* 34-35

Williams-Elegbe, S '*Public Procurement, Corruption and Blockchain Technology in South Africa: A Preliminary Legal Inquiry*' in G Quinot and S Williams-Elegbe (eds) *Public Procurement Regulation in Africa: Development in uncertain times* (Lexis Nexis 2020)

1 BA LLB LLM LLD (Stellenbosch), Senior Lecturer, Department of Public, Constitutional & International Law, University of South Africa.

2 Unreported, referred to as [2020] ZASCA 75, 30 June 2020; available online at <http://www.saflii.org/za/cases/ZASCA/2020/75.html>.

3 Para 5 of the judgment.

4 Para 12.

5 In para 13 the court stated that 'The requirement of a bank guarantee was to give the Municipality certainty as to the financial ability of the tenderer not only to purchase the property but also to complete its proposed development. It assures the Municipality that the tenderer will not abandon the project due to lack of funds.'

6 Unreported, referred to as [2020] ZASCA 74, 29 June 2020; available online at <http://www.saflii.org/za/cases/ZASCA/2020/74.html>.

7 See para 28.

8 Para 29.

9 Para 30 in referring to Judge Cameron's findings in *North West Provincial Government v Tswaing Consulting CC* 2007 (4) SA 452 (SCA) para 13.

10 See *Heyman v Darwins Ltd* [1942] 1 All ER 337 (HL) at 357B-D.

11 Para 33.

12 Para 35.

13 *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA).

14 Para 38.